

**EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

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FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 35, 41, and the Rules Governing § 2254 Cases and § 2255 Proceedings and accompanying forms with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments to Rule 35 were published for public comment in August 2001, and the amendments to Rule 41 and the § 2254 and § 2255 Rules and accompanying forms were published for public comment in August 2002. Neither public hearing scheduled for the proposed amendments was held because no one requested to testify.

The proposed amendments to Rule 35 define “sentencing” as used in the rule to mean the “oral announcement of the sentence” for purposes of correcting a sentence. The clarification eliminates the potential ambiguity in the meaning of “sentencing,” which triggers the seven-day period for making corrections in a sentence. The advisory committee originally proposed to define “sentencing” to be the “entry of judgment,” which triggers many other time periods in the appellate rules. But the advisory committee agreed with the weight of the public comments that “oral announcement of sentencing” is preferable.

Defining “sentencing” to mean the “oral announcement of the sentence” represents the majority view of the courts of appeals addressing the issue. The advisory committee determined that there likely would be less confusion generated if the majority view were adopted. More practitioners are accustomed to computing their time to file a Rule 35 motion from the “oral

announcement of the sentence” than from the “entry of judgment.” Furthermore, the entry of judgment may be delayed for substantial periods of time for any number of reasons. Defining “sentencing” to mean oral announcement of sentence would not expand the time during which a court could change the sentence, as it might be if the time period were to be triggered by the entry of judgment. The advisory committee concluded that the interests of finality would be better served by setting the triggering event as the “oral announcement of the sentence.”

Proposed amendments to Rule 41 set out procedures governing the issuance of a tracking-device warrant and the comprehensive revision of the Rules Governing § 2254 Cases and § 2255 Proceedings conform to recent legislation and reflect the best practices of the courts.

The Committee approved the proposed amendments to Rule 41 for transmission to the Judicial Conference. The amendments would provide guidance, now found only in the case law, to judges issuing tracking-device warrants. Following the meeting, the Deputy Attorney General, who abstained from the vote, requested the Committee to defer transmitting them. In light of the Deputy’s concerns and because the Department of Justice itself originally proposed the rule changes, the Committee decided to defer transmitting the proposed amendments. The deferral would allow the Department of Justice to present its concerns for the Committee’s consideration.

The Rules Governing § 2254 Cases and § 2255 Proceedings are amended not only to conform to the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. Law No. 104-132) (AEDPA) and best practices of the courts but also to improve their clarity, consistent with the recent comprehensive style revision of the Federal Rules of Criminal Procedure. Many of the § 2254 Rules are similar or identical to the § 2255 Rules. Although the advisory committee initially pursued a proposal to consolidate both sets of rules, it ultimately declined to do so because consolidation raised too many problems.

The proposed amendments to Rules 1, 10, and 11 of the § 2254 Rules and Rules 1, 10, 11, and 12 of the § 2255 Rules are stylistic only. The proposed amendments to the remaining rules include more substantive changes noted below.

The proposed amendments to Rules 2 of the § 2254 and § 2255 Rules remove the existing requirement in the rules that the petition or motion be signed by the petitioner. The amendments would allow others authorized by law to sign the petition or motion on behalf of the petitioner or movant, e.g., “next friend,” to do so. The proposed amendments also eliminate the authority of a clerk of court to return an insufficient petition or motion. Related amendments to Rules 3 of the § 2254 and § 2255 Rules would explicitly require the clerk to accept the filings.

Under the proposed amendments to Rules 3 of the § 2254 and § 2255 Rules, the clerk must file the petition or motion, consistent with Rule 5(e) of the Federal Rules of Civil Procedure, regardless of whether it fails to comply with these rules or local rules. Only a judge should refuse to accept a petition for filing, because the consequences of a late filing have become more serious in light of AEDPA’s one-year statute of limitations. The proposed amendments also add a provision referring to the statutory one-year limitations that applies to a petition or motion filed under these rules. The Committee Note observes that the rule does not refer to the equitable tolling of a statute of limitation, but recognizes that every circuit addressing the issue has ruled that equitable tolling is available in appropriate circumstances.

Rule 4 of the § 2254 Rules would be amended to eliminate the requirement that the clerk of court serve a copy of the petition only by certified mail. The other methods of service authorized by Civil Rule 5 may be used. The amendments would also allow service on appropriate state officers instead of limiting service to the state attorney general alone. Under the proposed amendments to Rules 4 of the § 2254 and § 2255 Rules, a respondent may respond to a

§ 2254 petition or § 2255 motion not only by an answer or other pleading, but also by motion, including a motion to dismiss.

Rule 5 of the § 2254 Rules would be amended to require that the respondent state whether any claim of the petitioner is barred by a failure to exhaust state remedies, a procedural bar, non-retroactivity, or a statute of limitations. It is also amended to require the respondent to provide the court with copies of any brief filed by the prosecution in the appellate court and the appellate court's opinions and dispositive orders relating to the conviction or sentence. The proposed amendments to Rules 5 of § 2254 Rules and § 2255 Rules adopt the practices of jurisdictions that explicitly provide an opportunity for the petitioner or movant to file a "reply" to the respondent's answer within a time fixed by the judge. The rules use the general term "reply" to refer to a petitioner's or movant's response to the answer, instead of the term "traverse."

The proposed amendments to Rules 6 of the § 2254 and § 2255 Rules add the requirement that the parties must provide reasons for requested discovery. Any proposed interrogatory and request for admission must accompany the discovery request, which must also specify any requested documents. These proposed changes reflect common practice in the courts.

Rules 7 of the § 2254 and § 2255 Rules clarify the authority of a judge to direct parties to submit to the court materials to assist it in its deliberations. The existing rules may be read narrowly to limit the court's authority to request only certain information in the record.

Under the proposed amendments to Rules 8 of the § 2254 and § 2255 Rules, a copy of the magistrate judge's findings may be delivered to all parties not only by mail, as required under the present rules, but also by any of the Civil Rule 5(b) service methods.

Rules 9 of the § 2254 and § 2255 Rules delete the provisions governing the dismissal of delayed § 2254 petitions or § 2255 motions. The AEDPA's one-year statute of limitations

renders the provision unnecessary and potentially confusing. The amendments also reflect the requirement in the AEDPA that the petitioner or movant obtain approval from the appropriate court of appeals authorizing the district court to consider a second or successive petition or motion.

The proposed comprehensive revision of the model forms for filing a § 2254 petition or a § 2255 motion simplify the language and reflect the amendments proposed to the § 2254 and § 2255 Rules, including provisions conforming to the AEDPA. The revisions specifically refer to the one-year statute of limitations and require that all grounds of relief be stated in the forms. Space is provided for reasons explaining an untimely filing.

The revised forms omit the illustrative lists of the most frequently cited grounds for relief in § 2254 cases and § 2255 proceedings. Some members of the advisory committee believed that the lists were useful, because they might narrow the issues presented to the court by focusing the petitioner's or movant's attention on discrete, articulable issues. But a majority of the advisory committee concluded that the lists were not particularly helpful and encouraged unsupported allegations. Moreover, no list could be comprehensive.

The advisory committee believed that requesting in the forms information regarding an earlier motion, petition, or other application concerning the judgment of conviction is essential to the efficient handling of petitions and motions under the § 2254 and § 2255 Rules. Many petitions or motions filed under the § 2254 and § 2255 Rules are quickly disposed of because they do not comply with AEDPA's requirements. Absent the requested information, the respondent and the court could waste time and energy exploring the merits of the claims that would ultimately be barred by AEDPA. The advisory committee did not agree that providing this information would shift the burden to demonstrate an affirmative defense from the respondent to the petitioner or movant.

The revised forms may be signed by a person other than the petitioner or movant when authorized by law. The “in forma pauperis” declaration relieving the petitioner or movant of paying the \$5 filing fee is left intact. The advisory committee determined that expanding the form to require more information than the proposed forms do would be counterproductive and unreasonable.

The Committee concurred with the advisory committee’s recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rule 35 and the Rules Governing § 2254 Cases and § 2255 Proceedings and accompanying forms and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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